ARMOR MULTI SYSTEMS SDN BHD & ANOR A

v.

YEW SAIR LAI & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
KANG HWEE GEE J
[SUIT NO: D8-22-616-2005]
8 AUGUST 2007

CIVIL PROCEDURE: *Affidavits - Affidavit by bankrupt deponent - Whether a bankrupt is incapacitated from deposing affidavit for application under O. 24 r. 10 Rules of the High Court 1980 - Failure to disclose status as a bankrupt in affidavit - Whether court may accept affidavit* C

CIVIL PROCEDURE: *Pre-trial case management - Effect, of - Order 34 r. 2 Rules of the High Court 1980 supersedes O. 25 r. 1 - Requirement for plaintiff to take out summons for directions superseded* D

CIVIL PROCEDURE: *Pre-trial case management - Time for application - Defence not filed - Pleading still open - Whether 14 days requirement started - Whether default in complying with O. 34 r. 2 Rules of the High Court 1980* E

Enclosure 66 was the defendants' appeal against the decision of the Senior Assistant Registrar in dismissing their application to F
compel the plaintiffs to produce documents which were in the possession of the plaintiffs. The said documents were numerous agreements signed between the plaintiffs and the defendants which the plaintiffs were relying on to prosecute their claim. The application was made under O. 24 r. 10 of the Rules of the High G
Court 1980. The plaintiffs objected to the application on the ground that the person who affirmed the affidavit supporting the application was at that time a bankrupt and was therefore incapacitated under s. 38(1)(d) of the Bankruptcy Act 1967 to affirm the affidavit. H

Enclosure 76 was an application by the defendants to strike out the plaintiffs' claim under O. 25 r. 1, O. 25 r. 8 and O. 34 r. 2. The defendants claimed that the plaintiff had failed to prosecute within the time period fixed by the learned judge. The plaintiff I
denied that the judge had fixed any such time period. Counsel for the plaintiffs submitted that the plaintiffs did not file the summons

for directions or the notice for case management under O. 34 r. 2 because the defence put up by the defendants was regularized only on 3 November 2006. By this time the 3rd defendant had yet to file its defence and hence pleading was not deemed to be closed as yet.

Held (allowing encl. 66 with cost and dismissing encl. 76 with cost):

(1) The fact that the 1st defendant was a bankrupt did not incapacitate him from deposing an affidavit for the purpose of O. 24 r. 10. The fact that he did not disclose his status as a bankrupt in his supporting affidavit should not prevent the court from accepting his affidavit as his status was immaterial under the circumstances. (paras 9 & 10)

(2) Order 34 r. 2 has now superseded O. 25 r. 1 which required the plaintiffs to take out a summons for directions. Order 25 r. 8 was irrelevant for the purpose of the present application as it was concerned with automatic direction in a personal injury action of which the claim of the plaintiffs was not. (paras 18 & 19)

(3) The pleading is deemed to be closed only after 14 days of the filing of the defence. The 3rd defendant had yet to file its defence. The pleading was therefore still open. The 14 days requirement had not started. There was therefore no default on the part of the plaintiffs to comply with O. 34 r. 2. (para 21)

Case(s) referred to:

Asia Commercial Finance (M) Sdn Bhd v. Pasadena Properties Development Sdn Bhd & Ors [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606 HC ***(refd)***

The Topps Co Inc v. Mally Jaya Sdn Bhd [1998] 2 CLJ Supp 235 HC ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, s. 38(1)(d)

Companies Act 1965, s. 125(1)

Rules of the High Court 1980, O. 24 r. 10, O. 25 rr. 1, 8, O. 34 rr. 2, 3

For the plaintiffs - Yusrin Faidz Yusoff; M/s Faidz, Leong & Chong
For the defendants - M/s Teja Singh Penesar & Co (Absent)

Reported by Amutha Suppayah

JUDGMENT

Kang Hwee Gee J:

Enclosure 66

[1] This is an appeal by the defendants against the decision of the Senior Assistant Registrar in dismissing their application to compel the plaintiffs to produce documents which are in the possession of the plaintiffs. The said documents are numerous agreements signed between the plaintiffs and the defendants referred to in the plaintiffs' statement of claim which the plaintiffs are relying on to prosecute their claim.

[2] The application is made under O. 24 r. 10 of the Rules of the High Court 1980 which read as follows:

> 10. (1) Any party to a cause or matter shall be entitled at any time to serve a notice in Form 43 on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof.
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> (2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice in Form 44 stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds.

[3] The defendants served on the plaintiffs the requisite notice requiring the documents to be produced for their inspection. The plaintiffs did not comply with the notice and hence the application before the Senior Assistant Registrar.

[4] The plaintiffs objected to the application on the ground that the person who affirmed the affidavit supporting the application was at that time a bankrupt and was therefore incapacitated under s. 38(1)(d) of the Bankruptcy Act 1967 to affirm the affidavit. Section 38(1)(d) read as follows:

A The bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;

B **[5]** See case law *The Topps Co Inc v. Mally Jaya Sdn Bhd* [1998] 5 MLJ 744 at Held (1) and (2):

(1) The mere fact that a deponent is an undischarged bankrupt does not deprive him of any legal competency in affirming
C an affidavit in support of the *ex parte* application for use in any court proceedings (see pp. 748I and 749A).

However, the status of a deponent who is an undischarged bankrupt is a material fact which must be made known to the court. It is trite law that in an *ex parte* application, the
D applicant is legally bound to make full and frank disclosure of all material facts, since such an application is an application of utmost good faith or *uberrimae fidei* (see p. 749C-D); *Ooi Bee Tat Development Sdn Bhd v. Ooi Bee Tat* [1985] 1 CLJ 449 and *Kibi (M) Sdn Bhd & Yang Lain lwn. Cheng Chew Chye (t/a Chuan Heng Import & Export) & Yang*
E *Lain* [1995] 1 AMR 399 followed.

The non-disclosure of this material fact pertaining to the deponent's capacity as undischarged bankrupt has fallen short of the standard of utmost good faith and the *ex parte* order
F should on this ground alone be set aside (see p. 749D-E); *Tunas (Pte) Ltd v. Mayer Investment Pte Ltd* [1989] 2 MLJ 132; *PMK Rajah v. Worldwide Commodities Sdn Bhd* [1985] 1 MLJ 86; *Ellinger v. Guinness Mahon & Co* [1939] 4 All ER 16 and *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 MLJ 153 followed.

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(2) The deponent cannot, by virtue as his status as an undischarged bankrupt, in the absence of previous permission of the Official Assignee or of the court under s. 38(1)(d) of the Bankruptcy Act 1967 hold the position of a general
H manager. Sections 38(1)(d) and 109 of the Bankruptcy Act 1967 clearly prohibit an undischarged bankrupt from otherwise directly or indirectly taking part in the management of any company. The prohibition is very wide in its scope and certainly wide enough to prohibit the deponent from holding himself out in his affidavit as a general manager when
I the deponent was an undischarged bankrupt at the time of affirming his affidavit (see pp. 749H-I and 750F-G); *Commissioner of Corporate Affairs (Vic) v. Bracht* [1989] 14 ACLR 728 followed.

[6] The 1st defendant it was submitted had not disclosed in his affidavit his status as a bankrupt at the hearing before the Senior Assistant Registrar and hence the affidavit cannot be used. Further it was submitted he made the affidavit on behalf of the other defendants which included companies which he managed in violation of s. 125(1) of the Companies Act 1965 which prohibits a bankrupt from acting as a director or taking part in the management of the company. See *Asia Commercial Finance (M) Sdn Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ (Rep) 606.

[7] Counsel for the defendants Encik Teja Singh Penesar is absent despite having been notified of today's hearing.

Findings And Decision

[8] Order 24 r. 10 is clear. The party who requires document which is in the possession of the other party and which is referred to in the latter's pleading (as in this case) is obliged to produce the document upon being served with a notice to do so, to enable the party to inspect it and to take copies of it.

[9] The fact that the 1st defendant deponent of the supporting affidavit was a bankrupt does not incapacitate him from deposing an affidavit for the purpose of O. 24 r. 10. This is made clear in *The Topps* case, *supra*.

[10] The fact that he did not disclose his status as a bankrupt in his supporting affidavit should not in my judgment prevent the court from accepting his affidavit as his status was immaterial under the circumstances. The plaintiffs in this case are limited companies and not the 1st defendant.

[11] The appeal is allowed with costs.

[12] The plaintiffs must comply with the defendants' request within two weeks from today.

Enclosure 76

[13] This is an application by the defendants to strike out the plaintiffs' claim under O. 25 r. 1 (summons for directions), O. 25 r. 8 (Automatic direction in respect of personal injury to claims) and O. 34 r. 2 (case management).

[14] The grounds are stated in the supporting affidavit of Yew Lay Yee, the 9th defendant as follows:

1. Saya adalah Defendan-9 yang dinamakan diatas.

2. Saya adalah pengarah bagi Defendan-6 (dan juga defendan-3) tersebut di atas dan diberi kuasa penuh untuk mengikrar afidavit ini.

3. Saya juga diberi kuasa penuh oleh Defendan-Defendan 4, 5 dan 8 tersebut di atas untuk mengikrar afidavit ini bagi pihak mereka.

4. Segala fakta-fakta yang di sini adalah dalam pengetahuan saya atau diberitahu oleh peguam kami atau diperolehi dari rekod-rekod buku-buku syarikat defendan-defendan 4, 5 dan 6, kecuali dinyatakan sebaliknya dan adalah benar sepanjang pengetahuan saya.

5. Afidavit ini adalah afidavit-sokongan bagi permohonan Defendan-Defendan 4, 5, 6, 8 dan saya sebagai defendan-9 untuk membatalkan Writ & Pernyata Tuntutan di sini.

6. Saya juga ambil pakai kandungan-kandungan semua afidavit-afidavit Wong Yoke yang diikrar sebelum ini, khasnya diikrar pada 22-05-06 dan 17-08-06 dan juga afidavit-afidavit saya yang difail sebelum ini. Semasa perdengaran permohonan di sini peguam saya akan, jika perlu, merujuk kepadanya dan semua ekshibit-ekshibit yang dilampirkan.

7. Saya dinasihati dan percayai bahawa tindakan harus dibuang disebabkan oleh ketiadaan pendakwaan oleh plaintif tempoh masa yang dibenarkan dan juga Plaintif gagal untuk menetapkan tindakannya untuk perbicaraan menurut arahan YA Hakim di dalam ini yang diberikan pada 03 haribulan, November, 2006.

8. Secara ringkas status prosiding di sini adalah seperti berikut:

   a) Writ & Pernyata Tuntutan (lamp:1) dikeluarkan pada 29-04-2005;

   b) Writ & Pernyata Tuntutan diserah pada 25-05-2005 (lamp:3);

   c) Kehadiran dimasuk pada 7-9-2005 (lamp:9);

   d) Pembelaan (lamp: 31) difail pada 20-01-2006;

   e) Pliding menutup pada 05-02-2006;

9. Pada 03-11-2006 YA Hakim telah mengarah peguam plaintif untuk mengambil tindakan untuk memfail Saman Untuk Pengurusan Kes.

10. Saya dinasihati dan percayai bahawa peguamcara Plaintif telah gagal mengambil langkah-langkah untuk menetapkan tindakan ini untuk bicara dan juga gagal mematuhi arahan YA Hakim untuk mengambil tindakan memfail Saman Dalam Kamar untuk pengurusan kes.

11. Terdapat kelewatan terlampau panjang.

12. Hak-hak defendan-defendan telah terjejas oleh kelewatan.

13. Oleh yang demikian, saya pohon perintah sebagai dipohon.

[15] The application is opposed by the plaintiffs *vide* the affidavit of Lim Soon Hock affirmed on 6 June 2007 which read as follows:

1. I am an advisor to the 1st Plaintiff abovenamed. Having been duly authorized by the 2nd Plaintiff I also affirm this affidavit for and on their behalf.

2. The facts deposed to herein are true and within my personal knowledge and/or derived from documents to which I have access, save where I indicate or the context suggests otherwise.

3. I crave leave of this Honourable Court to refer to:

   3.1 the Writ and Statement of Claim herein ("the SOC") dated 29.4.2005;

   3.2 the Statement of Defence filed by the 1, 4, 5, 6, 8 & 9th Defendants on 21.1.2006;

   3.3 the 4, 5, 6, 8 & 9th Defendants' Summons in Chambers to strike out writ of summons and statement of claim ("the Striking Out Application");

   3.4 the Affidavit in Support of Yew Lay Yee affirmed on 30.4.2007 (Affidavit YLY).

4. I make this affidavit in opposition to the 4, 5, 6, 8 & 9th Defendants' Striking Out Application for want of prosecution without prejudice of the Plaintiffs' right to raise a preliminary objection.

5. As a preliminary objection on the issue of capacity to affirm, I put the deponent of Afidavit YLY to strict proof of his directorship as claimed and deny that he is the Ninth Defendant.

6. Paragraphs 7, 9, and 10 of Affidavit YLY are denied. I was informed by the Plaintiff's solicitors and verily believed that the Judge did not make an order for the filing of case management and/or summons for directions to set the case for trial. I was informed by the Plaintiffs' solicitors that on 3.11.2006 the Defendants' application to add new evidence for the appeal to judge in chambers (Enclosure 51) came up for hearing together with the Appeal to Judge in Chambers against the Senior Assistant Registrar's decision to dismiss the Defendants' application to reply the Plaintiffs' application for judgment in default against the Fifth and Sixth Defendants (Enclosure 23).

7. I was informed by the Plaintiffs' solicitors that on the said date the Judge commented that he would prefer to hear the merits of the case and indicated that he would allow the Defendants' application in order to achieve this point. Further, in light of his Lordship's decision in Enclosure 43 (ie, dismissal of the interim receivers and setting aside of the default judgment against the 3rd Defendant), the Judge instructed parties to discuss on the matter in order to resolve the pending procedural issues and concentrate on the merits of the case. At no time had the Judge ordered the Plaintiff to file for Case Management and/or Summons for Directions.

8. I was informed that parties conceded to the Judge's recommendation with the following procedural effect:

   a) that the Defendants withdraw Enclosure 51 without costs;

   b) that the Defendants withdraw Enclosure 23 without costs;

   c) that the Defendants' application in Enclosure 16 is allowed without costs. As such the Statement of Defence (Enclosure 31) is deemed regularly filed on 3.11.2006 wherein the Defendants' Counsel Mr. Teja Singh Penesar informed the Court that the same is only a temporary defence and that the Defendants will be filing a complete statement of defence upon the outcome of their Notice to Produce.

   d) that the Plaintiffs' application to obtain Judgment in Default against 5th and 6th Defendants is withdrawn without costs.

9. In response to Paragraph 8 of Affidavit YLY, I aver that although a defence is filed on 20.1.2006, the solicitors of the 4, 5, 6, 8 & 9th Defendants who are also solicitors for the

3rd Defendant have informed this Honourable Court and the Plaintiffs' solicitors that the said defence is only a temporary defence without prejudice of their right to re-file a complete statement of defence upon the conclusion of their application for the Notice to Produce requiring disclosure of agreements (which is yet to be concluded).

10. I was informed by the Plaintiffs' solicitors that the Statement of Defence of the 4, 5, 6, 8 & 9th Defendants was filed out of time and it was only on 3.11.2006 that the Judge declared that the same was deemed regularly filed. As such, for the purpose of computation of time, Paragraph 8 (d) and (e) of YLY's Affidavit should not be accepted in terms of the timeline for close of pleadings.

11. Furthermore, I am informed by the Plaintiffs' solicitors that the 3rd Defendant (which is also represented by the solicitors for 4, 5, 6, 8 & 9th Defendants) have yet to file their Statement of Defence. In fact, the 3rd Defendant is currently applying to strike-out the summons and statement of claim based on the Plaintiffs' refusal to abide to the Notice to Produce filed by 4, 5, 6, 8 & 9th Defendants.

12. I am advised by the Plaintiffs' solicitors and verily believe that the nature of the claim is as such that it has to be tried against all Defendants simultaneously and as such, the inclusion of the 3rd Defendant's Defence is necessary before the case is to be set for trial.

13. I am also advised by the Plaintiffs' solicitors and verily believe that it is highly improper for the 4, 5, 6, 8 & 9th Defendants to move this Honourable Court to strike out the writ and statement of claim for want of prosecution when parties are actively involved in the proceedings as evidenced by the numerous applications and affidavits filed herein.

14. Further, there is a pending appeal before the Judge In Chambers against the Senior Assistant Registrar's decision to dismiss the 4, 5, 6, 8 & 9th Defendants' application for Notice to Produce (Enclosure 22); and as such the issue of the completeness of the Statement of Defence filed by the 4, 5, 6, 8 & 9th Defendants are still in question.

15. Having regard to the above special circumstances and in reply to Paragraphs 11 and 12 of YLY's Affidavit, I am advised and verily believe that there is no delay in the prosecution of this case and that the rights of the Defendants are not prejudiced as claimed. Both parties are actively involved in the interlocutory proceedings which has a direct

A effect on the Statement of Defence filed by the 4, 5, 6, 8 & 9th Defendants which was deemed regular on 3.11.2006, and the Statement of Defence which is yet to be filed by the 3rd Defendant.

B 16. By reason of the matters aforesaid, I humbly pray that the 4, 5, 6, 8 & 9th Defendants' application be dismissed; and that costs to be ordered to be paid forthwith on an indemnity basis by the 4, 5, 6, 8 & 9th Defendants to the Plaintiffs.

C **[16]** Counsel for the plaintiffs submits that the reason why the plaintiffs did not file the summons for directions or the notice for case management under O. 34 r. 2 was only because the defence put up by the defendants was regularized only on 3 November 2006. By this time the 3rd defendant had yet to file its defence and hence pleading was not deemed to be closed as yet, the D defendants being represented by a common solicitor. To date we have not proceeded to case manage as the 3rd defendant has yet to file its defence. We had in fact obtained a judgment in default of defence against the 3rd defendant but it succeeded in having it E set aside.

[17] Counsel for the defendants is absent.

Findings And Decision

F **[18]** Order 34 r. 2 has now superseded O. 25 r. 1 which required the plaintiffs to take out a summons for directions.

[19] Order 25 r. 8 is irrelevant for the purpose of the present application as it is concerned with automatic direction in a personal injury action of which the present claim of the plaintiffs G is not.

[20] In deciding whether the plaintiffs' claim ought to be struck out by reason of their inaction it would only be necessary for me to consider it under O. 34 r. 2 and r. 3 which read as follows:

H 2. (1) The plaintiff shall, not later than 14 days after the close of pleadings under Order 18, rule 20, cause to be issued from the Registry of the Court a notice in Form 63 requiring the parties to the action to attend before the Judge.

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(2) If the plaintiff fails to comply with the provisions of paragraph (1), the Judge may direct the Registry of the Court to issue a notice in Form 64 to the plaintiff to show cause why the action should not be struck out.

3. (1) If the parties to the action fail to appear before the Judge upon the return date stated in the notice in Form 63, the Judge may in his absolute discretion make any order as meets the ends of justice, including striking out the action or any defence or counterclaim, or other pleading or entering judgment against the defendant, or if there are several defendants, then against one or more of them or he may, after recording his reasons for doing so, adjourn the proceedings to another date.

(2) Where a notice in Form 64 has been issued pursuant to the provisions of rule 2(2), the Judge may, upon the return date specified in such notice, strike out the action or make any other order or give such directions as may be specified in the order.

[21] The pleading is deemed to be closed only after 14 days of the filing of the defence. Here it is clear that the 3rd defendant had yet to file its defence. The pleading is therefore still open. The 14 days requirement has not started. There is therefore no default on the part of the plaintiffs to comply with O. 34 r. 2.

[22] The application is dismissed with costs.